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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL. *Petitioners*

v.

WEINACKER'S, INC. *Respondent*

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 214 So. 2d 913 (A. 100-120). The opinion of the Circuit Court of Mobile County, Alabama, is unreported (A. 91-95).

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 19, 1968 (A. 121). A petition for rehearing was denied on November 7, 1968 (A. 121). An order was entered on February 4, 1969 by Mr. Justice Hugo L. Black extending the time for

filing a petition for a writ of certiorari to April 5, 1969. The petition for a writ of certiorari, filed on March 28, 1969, was granted on October 13, 1969. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A state court injunction prohibits, as trespass on private property, peaceful picketing on the publicly-used but privately-owned sidewalks adjacent to a store, in support of a strike by the store employees, called by the union certified by the National Labor Relations Board to represent them, to secure employment terms acceptable for work at the store after a breakdown of negotiations with the employer for a collective bargaining agreement. The questions presented are (1) whether this prohibition abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution; (2) whether the state court is without jurisdiction to adjudicate the controversy because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board; and (3) whether the prohibition forbids the exercise of the federal right to engage in "concerted activities for . . . mutual aid or protection" guaranteed by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, *et seq.*), are set out in Appendix A (*infra*, pp. 1a-4a):

STATEMENT

A. The Physical Layout of the Area Surrounding the Store

In the city of Mobile, Alabama, respondent Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building. Weinacker's owns this building and the area which surrounds it. Within this area sidewalks encircle the building, walkways lead to it, and a motor vehicle parking lot for the use and convenience of the customers in parking their automobiles is located between the front of the building and the public property which adjoins the parking lot. The main entrance to the store building fronts to the south on the private sidewalk; the adjacent motor vehicle parking lot separates the store building and the private sidewalk from a public street called Government Street. The privately-owned area which surrounds the store building is bounded on three sides by public streets, Government Street to the south, Catherine Street to the east, and Macy Street to the west. Public sidewalks are adjacent to these public streets. Weinacker's also operates an automobile service station across Catherine Street to the east. (A. 91-92, 1-2.)[1]

[1] A diagram of the Weinacker property is annexed to this brief as Appendix B (*infra*, p. 5a). It shows that the perimeter of the property spans about 1,832 feet, or more than one-third of a mile. There are seven automobile entrances to the property. The distance between the nearest automobile entrance to the picketed store entrance is 115 feet; the distance between the farthest automobile entrance to the picketed store entrance is 385 feet; intermediate distances are 143 feet, 169 feet, 239 feet, 269 feet, and 364 feet. This diagram is not of record.

B. The First Request for Immediate Injunctive Relief

On January 21, 1965, Weinacker's filed its original bill with the Circuit Court of Mobile County, Alabama, against Retail Clerks' Union Local 458 of Mobile, Clifford Taggart, its business agent, Riley Hobbs, a member, and James Stuckey, its president, collectively called respondents (A. 1-6, 26, 88). The bill alleged that (1) Weinacker's "owns the . . . shopping center . . . and its parking area and walkways adjacent to the shopping center . . . used by the customers of the shopping center" (A. 1-2); (2) the three individual respondents "walked back and forth in front of the door or doors to the shopping center on the area owned and occupied" by Weinacker's "engaged in picketing the shopping center" (A. 2); and (3) this picketing constitutes an "unlawful trespass upon its premises" (A. 2). Claiming "irreparable injury" by a "continuous invasion" of its "property and property rights", Weinacker's prayed that the court "forthwith issue a temporary writ to enjoin" the Union and the individual respondents from "directly and indirectly . . . entering upon property of" Weinacker's and "that they be enjoined from any act on the property . . . which would be a trespass upon . . . property . . ." (A. 3). The court on the same day denied the request for temporary relief instanter and set the petition for that relief down for hearing on January 25, 1965 (A. 5). On January 22, 1965, the Union and the individual respondents moved to quash the bill on the ground that the court "has no jurisdiction over a lawful strike and the peaceful picketing activities connected therewith" in that the "National Labor Relations Board, federal statutes and procedures have preempted this field . . ." (A. 8).

C. The Second Request for Immediate Injunctive Relief

On January 22, 1965, after the court had set the request for temporary relief down for hearing, Weinacker's again petitioned "for immediate injunctive relief." It asserted that two named individual respondents "have proceeded to constantly trespass upon" Weinacker's "property by marching or parading back and forth to the immediate doorway of" its "place of business" and that "this conduct has been more intensive" since the petition for temporary injunctive relief had been set for hearing. It urged that "immediate injunctive relief" is necessary "to enjoin the continuous obstructing of the doorway to the . . . shopping center." (A. 9-10.) The request was supported by six conclusory and identically-worded affidavits averring that "Respondents have trespassed upon . . . [Weinacker's] property to the extent of obstructing the customers in entering and leaving the door of Weinacker's . . . and that the Respondents in carrying signs are acting in such a way as to interfere with . . . [Weinacker's] business and such action is on the private property" of Weinacker's (A. 11-14).[2] An *ex parte* injunction issued forthwith, without any notice or opportunity to be heard, prohibiting "trespassing upon the property of . . . [Weinacker's] and . . . interfering with . . . [Weinacker's] property and right of ingress and egress to the . . . property and place of business" (A. 15-16).

[2] The affidavits are so stereotyped that four of them describe the affiant as "he/she" with "he" or "she" crossed out to identify the gender (A. 11-12, 14).

D. The Plea to the Jurisdiction of the Court Based on the Preemption of the Subject Matter by the National Labor Relations Board

On January 25, 1965, the Union and the individual respondents filed a plea to the jurisdiction of the court (A. 17-26). The plea averred that the Union was a labor organization and Weinacker's an employer within the meaning of the National Labor Relations Act (A. 17); that the business of Weinacker's "affects interstate commerce within the meaning of the National Labor Relations Act, and its labor relations are subject to the exclusive jurisdiction of the National Labor Relations Board" (A. 24); that the activities of the Union and the individual respondents "constitute concerted activity for their mutual aid or protection, the right to engage in which is guaranteed and protected by the National Labor Relations Act" (A. 24); that "the National Labor Relations Board assumed jurisdiction over the subject matter of [Weinacker's] bill and said jurisdiction is exclusive" (A. 24); and that the jurisdiction of the court is "therefore pre-empted" (A. 25).

The plea documented the following specific facts: On December 19, 1963 the Union filed a petition with the NLRB seeking certification as the representative of certain of the employees of Weinacker's (A. 26, 27-30). On February 13, 1964, following a hearing held on January 20, 1964, the NLRB's Acting Regional Director, upon finding that Weinacker's is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction", directed an election in a unit composed of "All full time and regular part time employees at Employer's Mobile, Alabama, retail operation, including

ing office clerical employees and the grocery, produce, meat, drug, warehouse, and service station departments . . ." (A. 18-19, 30-33). An election was conducted on March 9, 1961, and resulted in a vote of 18 employees for the Union, 12 against, with 27 ballots challenged (A. 19, 37). On March 13, 1961, Weinsteker's filed objections to the conduct of the election (A. 19, 38-40). On April 10, 1961, following an investigation of the objections and the challenged ballots, the NLRB Regional Director issued a decision overruling the objections, resolving the challenged ballots, and certifying the Union as the representative of the unit of employees (A. 19-20, 40-41). On April 25, 1961, Weinsteker's requested the NLRB to review the Regional Director's decision (A. 20). On May 22, 1961, the NLRB denied the request because "it raises no substantial issues warranting review" (A. 20, 33-35).

On August 31, 1961, and again on September 16 and 30, 1961, the NLRB Regional Director issued a complaint against Weinsteker's alleging the commission of numerous unfair labor practices during the period from the filing of the representation petition through and after the Union's certification (A. 20-22, 41-50). In summary, the complaint alleged [illegible] interrogation of employees concerning their union activities, designation [illegible] threat of discharge of any employee who had anything to do with the Union, [illegible] surveillance of union meetings and activities, [illegible] employees would be discharged unless they were against the Union, [illegible] the right to engage in activities [illegible] formation [illegible] and [illegible] solicitation [illegible] and [illegible] solicitation with the store

(9) discharge of nine employees because of their union activity, (10) furnishing four employees less employment because of their union activity, and (11) denial of dining and rest room facilities to two employees because of their union activity (A. 69-73, 76-77, 79). The complaint further alleged that Weinacker's had defaulted in its bargaining obligation by (1) refusing to bargain in good faith, (2) refusing to furnish wage and related information relevant to bargaining, and (3) unilaterally changing existing employment terms (A. 74-75, 77). Weinacker's joined issue by a general denial (A. 22-23, 80-84), and on October 12, 1964, a hearing was begun before an NLRB trial examiner (A. 23).

The plea to the jurisdiction further averred that (1) the refusal of Weinacker's to bargain in good faith "led to a strike which was started by the Respondents on the 12th day of December, 1964" (A. 23); (2) "At no time has there been any force or violence resulting from the peaceful picketing on the part of the Respondents" (A. 23); and (3), to enjoin the Union's activities "would infringe upon the rights" of the Union and its members "under the First and Fourteenth Amendments to the Constitution of the United States" (A. 25), and would enter the domain preempted by the NLRB (A. 25).

At the time that the plea to the jurisdiction was entered, no decision upon the unfair labor practice complaint had been reached (A. 23). On April 15, 1965 the trial examiner issued, and on June 25, 1965 the NLRB adopted, his decision finding that Weinacker's had committed the unfair labor practices alleged. *Weinacker's Brothers, Inc.*, 153 NLRB 150

The decision summarized the unfair labor practices as follows (*id.* at 184-185):

> [I]t. Weinacker's] interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by the following conduct:
>
> (a) Unlawfully interrogating employees with regard to their concerted or union activities and sentiments.
>
> (b) Threatening employees that it would be futile for employees to select the Union as their bargaining representative if its employees struck.
>
> (c) Threatening employees that it would be futile for employees to select the Union as their bargaining representative if its employees struck.
>
> (d) Threatening employees with discharge because they were in favor of the Union.
>
> (e) Threatening employees that it would be futile for employees to select the Union as their bargaining representative, and that it refused to give them full employment at union scale.
>
> (f) Threatening employees with discharge or surveillance of employees' protected activities.
>
> (g) Soliciting employees to withdraw their union authorization cards and telling them to accomplish such action.
>
> (h) Promising a benefit to employees if they refrained from becoming members of the Union.
>
> (i) Prohibiting employees from wearing union buttons.
>
> (j) Promulgating and maintaining a rule prohibiting employees from wearing union buttons in violation of Section 8(a)(1) of the Act.

(k) Enforcing a no solicitation rule prohibiting solicitation by union officials while engaging in an extensive antiunion campaign in working areas and on employees' working time.

(l) Threatening to discharge an employee for responding to a subpena to testify in a National Labor Relations Board hearing instead of reporting to work.

[2. Weinacker's] violated Section 8(a)(3) and (1) of the Act by the following conduct:

(a) Discriminatorily discharging Burl Dock, Lorenzo Matthews, Harry Wright, Cleveland Dortch, Marguerite Etheredge, Mildred Turner, W. J. Williams, Elizabeth Boyette, and Sadie Burgess.

(b) Discriminatorily reducing the workhours of Elizabeth Boyette, Sadie Burgess, Jack Smith, and Donald Harris.

(c) Discriminatorily denying certain employees the dining and restroom facilities they had customarily used.

[3. Weinacker's] violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with said Union, commencing on May 25, 1964, as the collective bargaining representative of the unit described hereinabove.

On June 28, 1966, the Court of Appeals for the Fifth Circuit summarily enforced the NLRB order remedying the unfair practices found.

E. The Decision of the Circuit Court of Mobile County

On January 25, 1965, the same day that it was filed, the plea to the jurisdiction was overruled (A. 85). On February 1, 1965, the Union and the individual

respondents answered (A. 85-89). They averred that they had "legally picketed back and forth in front of the door of the shopping center" (A. 86); denied that they had "obstruct[ed] customers from leaving or entering . . . [Weinacker's] place of business" (A. 87), or that their conduct constituted an illegal trespass (A. 86); affirmed that their acts were within "the realm of peaceful picketing . . . legal under the National Labor Relations Act and the First and Fourteenth Amendments to the Constitution of the United States" (A. 87); and reiterated that the court's jurisdiction was preempted (A. 86). The answer concluded with respondents' motion to dismiss the bill and to dissolve the injunction that had been issued (A. 87).

On March 26, 1965, more than two months after the *ex parte* injunction had issued, a nonevidentiary hearing of the motion to dismiss and dissolve was held (A. 90). On April 1, 1965, the Circuit Court issued its decision (A. 91-95). The court found that a labor dispute existed; that the Union had been certified by the NLRB as the representative of the employees of Weinacker's; and "that numerous differences have existed and do now exist between [Weinacker's and the Union] over the matter of a collective bargaining agreement between them and when contract negotiations broke down, the Union called a strike which is now in progress" (A. 91). The court further found that "Picketing was first carried on by the Respondents on the public sidewalks of the City of Madge and later on the sidewalks on [Weinacker's] premises and in front of the entrances to [Weinacker's] storebuilding. While this picketing on [Weinacker's] premises and in front of the entrances to its building has been without any acts of actual

violence or threats of violence to any persons, it has been carried out in such a manner as to obstruct the customers of . . . [Weinacker's] in entering and leaving the entrances to said building on the south or Government Street side thereof." (A. 91-92). The court further found that the picketing continued after Weinacker's, "through one of its officials, had requested the respondents not to trespass on Company premises; however, in obedience to the Writ of Temporary Injunction, the Respondents have confined their picketing of . . . [Weinacker's] premises to the public sidewalks of the City of Mobile adjoining the same." (A. 92).

In considering the legal import of these findings, the court stated that "the first question in this case is whether or not the State Courts have jurisdiction to hear it. And, the second question is whether or not, if the State Courts do have jurisdiction of the subject matter, the Respondents are guilty . . . of the subject of injunctive relief." (A. 93). . . . As to the first question, the Court held that "where a store owner invites prospective customers to come to his store to trade and to park on his grounds made available therefor while doing business with the store owner, the invitation is for one particular purpose, not for every purpose to the extent of making the use of the store owner's parking lot and sidewalks a purely private character . . . which the state courts [retain] jurisdiction to hear suits to enjoin peaceful picketing subject to the trespassing." (A. 94). As to the second question, the Court held that "if you could keep the Respondents from trespassing [the Complainant] presumably by locking, after hours, doors to Grayco [London of sporadic picketing subject to the Respondents' [the First and Fourteenth Amendments to the Federal Constitu-

tion, did not give them the right to remain on the parking area and sidewalks of . . . [Weinacker's] after they were ordered to leave" (A. 94).

The court concluded that it "does have jurisdiction of the subject matter involved in this suit which has not been divested by the National Labor Relations Act" (A. 94). It further concluded that "the Respondents, by going on . . . [Weinacker's] premises for the purpose of picketing the . . . storebuilding of [Weinacker's], were trespassers, and were employing an unlawful means of exercising their right to picket . . ." (A. 95). It decreed that the injunction "heretofore issued . . . be . . . continued until ordered dissolved by due process of law" (A. 96). That injunction prohibits "trespassing upon the property of . . . [Weinacker's] and . . . interfering with the . . . property [of Weinacker's] and right of ingress and egress to the . . . property and place of business [of Weinacker's]" (A. 15-16).

F. The Decision of the Supreme Court of Alabama

On April 9, 1965, an appeal was taken from the Circuit Court's judgment to the Supreme Court of Alabama (A. 96). The appeal was argued and submitted on November 10, 1965 (A. 99). The appeal was decided on September 29, 1966 (A. 100), almost three and one-half years after it had been taken and almost three years after it had been submitted. In the interim this Court on May 20, 1968 had decided *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, holding that the First Amendment forbids the issuance of a state court injunction prohibiting a trespass picketing at the premises of a store within a shopping center publicizing a union's labor dispute with the store.

The Supreme Court of Alabama affirmed the judgment of the Circuit Court (A. 121). On the question of preemption of state court jurisdiction, the Supreme Court held that (A. 119-120):

> The activity enjoined in the instant case is neither protected by § 7 nor prohibited by § 8 of the National Labor Relations Act. We are of opinion that it is not necessarily required that the Congress intended to uproot the state's [illegible] jurisdiction over trespass [illegible] privately owned property, which does not have the usual public character of a town street or business block, in a manner so as to obstruct [illegible]

On the question of the constitutional protection of picketing as free speech the Supreme Court held that (A. 120):

> The respondents say, in the second place, that the court erred in enjoining their peaceful picketing activity because they have a constitutional right to picket peacefully [illegible] freedom of speech. Without [illegible] this question, we think that [illegible] is to [illegible] more than free speech [illegible] the right to picket must be [illegible] the owner to use his property [illegible] which is a potential [illegible]

SUMMARY OF ARGUMENT

I

area and those passing through. . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put" *Id.* at 319-320).

And so, as the California Supreme Court has concluded in an identical situation, the single store's "sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exercise First Amendment rights." *In re Lane*, 72 LRRM 2286, 2289 (August 20, 1969). Otherwise, just as in *Logan Valley*, "by erecting a '*cordon sanitaire*' around its store," the market operator would have "succeeded in immunizing itself from only the most public criticism." *Id.* at 2288-89.

II

Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the NLRB. Section 7 of the Act encourages to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." Peaceful picketing publicizing a lawful position is a prominent expression of protected activity. And the picketing in this case is within the heartland of statutory solicitude. The Court has consistently held,

peaceful primary picketing incident to a lawful strike to be protected conduct under the Labor Management Relations Act.3 *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385.

The circumstance that peaceful picketing is conducted on the exterior grounds of the private, but opened property of a store does not empower a state court to act. The problem of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution belongs to the usual administrative routine of the Board. In a variety of contexts private property has been required to yield to the statutory guarantee of protected concert. The employer's property interest does not of itself control. "It is not every interference with property rights that is within the Fifth Amendment . . . . Inconvenience, or even some dislocation of property rights, may be necessary . . . to realize fulfillment of the rights conferred by the National Labor Relations Act. *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 802, n. 8; *N.L.R.B. v. Stowe Spinning Co.*, 336 U.S. 226, 232.

In short, one function of the NLRB is to keep the channels of communication open and unobstructed, and in the discharge of that function appropriate access to property in order to reach the audiences cannot be defeated through the simple assertion . . . of a landlord's interest." *Hudgens*, 192 NLRB 25, 32. The NLRB is thus not "stripped of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing conducted on the exterior grounds of the private but open property of a store. It is the NLRB's business in the first instance to accommodate claimed conflicts

obstructive picketing to hold that "'picketing and trespassing' can be prohibited absolutely on . . . [Weinacker's] premises." *Ibid.* Obstructive picketing authorizes the elimination of the obstruction, not the elimination of picketing.

Nor can the court below justify the suppression of picketing by asseverating that its conduct on privately-owned but publicly used premises "is a potential cause of violence" (A. 120), or by prophesying that "obstruction can easily and quickly escalate into an affray . . ." (A. 115). This chimera of potential violence was identically present in *Logan Valley*, and it is as unavailing here, as it was there, to justify prohibition of picketing—"protected by the First Amendment" (391 U.S. at 313)[12]—in the vicinity of the store. ". . . [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 508.

Put another way, the injunction prohibits "trespassing upon the property" of Weinacker's (*supra*, p. 13), and that bans peaceful picketing anywhere on the exterior grounds of that property. The potential for violence is said to justify the bar. But it has been a very long time—and rarely even in the distant past—since it has been said that a risk of violence inheres in peaceful picketing and its outright ban is therefore justified on that account. This Court has upheld, only once and over vigorous dissent, a ban of peaceful picketing because it was enmeshed in a

[12] "[O]ur decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection." *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 152.

pattern of actual violence which gave the picketing a coercive effect whereby it would operate destructively as force and intimidation. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287. This ban of future peaceful picketing because of its past enmeshment in violence is highly exceptional. The usual course, even when picketing is marred by violence, is to prohibit the violence but permit the picketing. *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139-140; *U.M.W.* v. *Gibbs*, 383 U.S. 715, 729-732. But neither approach even comes to the fore unless there is actual violence. This Court has never sanctioned a ban of peaceful picketing because of a supposed but unmaterialized risk of violence which, were it a sound evaluation of the character of picketing, would inhere in all picketing at all times and everywhere. This Court has, indeed, expressly rejected this very notion. *Thornhill* v. *Alabama*, 310 U.S. 88, 105. It should not be resurrected at this late date just because, in the changing "circumstances of our times" (*id.* at 102), the locus of picketing has moved with the labor dispute into the property which the private owner has opened to public entry. In our industrial society peaceful picketing has long since been identified with unimpeachable orthodoxy as "**fair persuasion.**"[13]

5. The court below states that "picketing on the streets abutting . . . [Weinacker's] store lot is not materially less effective than picketing on the lot itself" (A. 120). This is neither relevant nor accurate. It is irrelevant because *Logan Valley* reiterates the teaching that "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other

[13] Restatement, Torts, § 779 (1939).

place.'" 391 U.S. at 323-324. It is inaccurate because "the difficulties and hazards to those attempting to exercise First Amendment privileges are as present here as they were in *Logan Valley*." *In re Lane*, 72 LRRM 2286, 2289 (Cal. Sup. Ct. August 20, 1969).

Pickets stationed at the automobile entrances to the parking lot are exposed to the risks of moving traffic. Motorists intent on turning from a busy street into the parking lot do not read picket signs and are hardly likely to be willing recipients of leaflets while driving. When the car is parked and its occupants move to the store, the picket signs are at their backs and they are no longer within reach of the leaflet distributor. And it requires many more pickets to man seven auto entrances to the parking area instead of one main entrance to the store itself. "It is therefore clear that the restraints on picketing and trespassing approved . . . here substantially hinder the communication of the ideas which petitioners seek to express . . ." (*Logan Valley*, 391 U.S. at 323).

In short, picketing on the public streets is screened from the store by the intercepting parking lot located in between. To confine the picketing to the public streets creates precisely that "*cordon sanitaire* of parking lots" around the store which *Logan Valley* condemns. 391 U.S. at 325. The immediate vicinity of the store is the natural and effective place to communicate the picket's message. The parking lot interposes a buffer between the communicant and his audience and therefore inescapably blunts the expression of First Amendment rights.

6. The court below states that the injunction barring picketing within Weinacker's premises is "'aimed

narrowly at a trespass . . .'" (A. 109, 112). To label the injunction "narrow" does not change its engulfing character. It works just the total exclusion from the premises, whether it be called regulation or suppression (391 U.S. at 321), which *Logan Valley* prohibits. Upon a proper showing of need an injunction may be narrowly drawn to control the number and location of pickets and the manner of picketing in the vicinity of the store. But to bar picketing altogether from the opened premises is the antithesis of a narrow injunction allowing picketing at the public place but circumspectly controlling its physical incidents.[14]

7. Accordingly, when the court below states, in support of the injunction, that "the right to picket must be balanced against the right of the owner to use his property in a lawful manner" (A. 120), all that it in reality asserts is the "claimed absolute right under state law to prohibit any use of . . . [the owner's] property without . . . [its] consent" (391 U.S. at 324). But "[n]aked title" is no more available in this case than it was in *Logan Valley* to justify total exclusion from property opened to the public. *Ibid.* It surely does not qualify as a "*compelling* governmental interest" sufficient to suppress the exercise of a constitutional right. *Shapiro* v. *Thompson*, 394 U.S.

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[14] "'An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental liberties when the end can be more narrowly achieved.' . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case." *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 183-184.

618, 634. While petitioners have "amply shown" that their "activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner[s]' activities, which can justify the broad prohibitions which it has imposed." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 444; *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 7-8; *United Mine Workers of America, District 12* v. *Illinois State Bar Assn.*, 389 U.S. 217, 222.

In sum, the decision below in this case cannot stand compatibly with this Court's decision in *Logan Valley*. It is an experiment in circumvention of *Logan Valley's* plain import. That experiment must be put to an abrupt end. *Logan Valley* means that "the paramount and preferred place given to the First Amendment freedom of speech in our democratic system . . . should be accorded precedence over the mere 'naked title' . . . of [a] market owner[']s[] . . . interest in the premises." *In re Lane*, 72 LRRM 2286, 2289 (Cal. Sup. Ct. August 20, 1969). Regress from this teaching is retreat from the First Amendment.

II. Peaceful Picketing in a Labor Dispute Is Within the Exclusive Regulatory Scope of the National Labor Relations Act, and Therefore Within the Field Preempted by the National Labor Relations Board, Whether or Not Conducted on the Exterior Grounds of Privately-Owned but Publicly-Used Property.

The determination of a dispute over the allowability of picketing conducted on the exterior grounds of privately-owned but publicly-used property in the course of a labor dispute is initially within the sole

competence of the NLRB and therefore outside the jurisdiction of a state court.[15]

Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the NLRB. Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection. . . ." Peaceful picketing publicizing a lawful position is a preeminent expression of protected activity.

"Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 62. Thus, prohibition of secondary labor pressure carries the express reservation that nothing in that ban "shall be construed to make unlawful . . . any primary strike or primary

[15] This Court in *Logan Valley* did not reach the preemption question because decision was based on First Amendment grounds. 391 U.S. at 309-310, n. 1. Demurring from predicating the decision on the First Amendment, and regretting that the preemption question had not been properly preserved, Justice Harlan observed that "it seems clear . . . that the petitioner has a substantial preemption claim." *Id.* at 333-334. Justices Black and White, while dissenting from the conclusion that the First Amendment had been violated, separately emphasized that they did not reach any issue under the National Labor Relations Act. *Id.* at 329, n. 3; 340. The NLRB in its amicus brief in *Logan Valley* expressed the view that to "subject the picketing here to State court jurisdiction would entail a real danger of creating the very conflicts and 'frustration of national purposes' which *Garmon* and the other preemption decisions of this Court have sought to avoid". (br. pp. 5-6, 13).

picketing." NLRA, § 8(b)(4)(B); *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, 498-499. Similarly, in regulating organizational and recognition picketing, Congress has with certain qualifications explicitly excepted from prohibitory reach "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." NLRA, § 8(b)(7)(C). In the absence of the "requisite clarity" this Court refused to read into the "congressional plan" a purpose "to proscribe all peaceful consumer picketing at secondary sites" aimed at the identified product of a disfavored firm. *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 63. And so, unless clearly within the restraint which the Act itself imposes, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters*, 346 U.S. 485, 500. The scrupulousness of Congress and this Court reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 63.

The picketing in this case publicized a strike by the store's employees to obtain a satisfactory collective bargaining agreement from their employer after negotiations by their union certified as their representative had failed. It was therefore within the heartland of statutory protection. "The Court has consistently held peaceful primary picketing incident to a lawful strike to be protected conduct under the Labor Management Relations Act. 'Picketing has traditionally been a major weapon to implement the goals of a strike. . . .'" *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385. "The protected primary strike 'is aimed at applying economic pressure

by halting the day-to-day operations of the struck employer,' . . . and protected primary picketing 'has characteristically been aimed at all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavoring to halt,' . . . including other employers and their employees." *Id.* at 388.

It is therefore clear that the state court in this case "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners." *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139. The circumstance that peaceful picketing is conducted on the exterior grounds of the private but opened property of a store does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution "'belongs to the usual administrative routine' of the Board."[16] In a variety of contexts private property has been required to yield to the statutory guaranty of protected concert.[17] "We

[16] *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130.

[17] In enforcing an NLRB order directing the employer to permit the union to conduct an independent time study within the plant, the Court of Appeals for the Second Circuit stated that: "Nor are we persuaded that the Board's decision unduly invaded the Company's property rights. In other circumstances, the courts have not hesitated to afford union representatives access to company premises in furtherance of the Act's purposes. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (1946) (union granted access to company town to hold organizational meeting); *N.L.R.B.* v. *Lake Superior Corp.*, 167 F. 2d 147 (6th Cir. 1948) (union granted access to company-owned logging camp to solicit membership); *N.L.R.B.* v. *Cities Service Oil Co.*, 122 F. 2d 149 (2d Cir. 1941) (union granted access to company ship to discuss grievances with unlicensed personnel)." *Fafnir Bearing Co.* v. *N.L.R.B.*, 362 F. 2d 716, 722 (C.A. 2). See also, *Interlake S.S. Co.*, 174 NLRB No. 55, 70 LRRM 1177, 178 NLRB No. 20, 72 LRRM 1008 (access by union organizers to ship while crew is in port to solicit union adherence).

have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression." [18]

The irrelevance to preemption of the fact that the picketing is conducted on the exterior grounds of the store's private but open property is appropriately elaborated in relationship to the reach of the injunction. The injunction in this case prohibits "trespassing upon the property" of Weinacker's by both employees and nonemployees of the store (A. 15-16, 95). It brings state jurisdiction into collision with federal authority whether the ban of picketing on the exterior store grounds is related either to the store employees or to nonemployees. We consider the situation of the employee first.

1. An employee cannot be barred from engaging in protected activity on his employer's premises simply because the employer owns the property. Specifically, it is settled that an employee may distribute union literature on his employer's parking lot, as indeed in any nonworking area (*Stoddard-Quirk Mfg. Co.*, 138 NLRB 615), so long as he acts on his nonworking time. *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 796-797. A rule restricting the exercise of this right is invalid "'in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.'". *Id.* at 803, n. 10. The control of littering and petty pilfering is no justification. *Id.* at 797. Nor is it germane that other

[18] *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 131 (C.A. 2), cert. denied, 376 U.S. 951. See also, *N.L.R.B.* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26, 29-30 (C.A. 2), enforcing as modified, 156 NLRB 233, 247-265.

means of communication are available to the employees. *Id.* at 798-799, 801. Nor is the employer's ownership interest decisive. "'It is not every interference with property rights that is within the Fifth Amendment. . . . Inconvenience, or even some dislocation of property rights, may be necessary. . . .'" *Id.* at 802, n. 8; *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226, 232.

In short, absent proof of special circumstances, the parking lot is available to the employee to distribute union literature.[19] The state injunction prohibiting employees from "trespassing upon the property" of Weinacker's in order to broadcast their strike is thus flatly incompatible with the federal rule. An employee on strike is still an employee (*N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345); the right to distribute union literature on the employer's parking lot extends to "all employees of a single employer—whether they are working, on strike or leave of absence or sick leave or temporary layoff or temporary transfer, or have been discriminatorily discharged or are about to quit . . ." (*Cranston Print Works Co.*, 117 NLRB 1834, 1842).[20] Accordingly, when a state injunction stops employees, by prohibiting "trespassing upon the property" of Weinacker's, from distributing handbills on the exterior grounds of the store publicizing the strike, it is at the least surely arguable that it forbids what the Na-

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[19] *National Steel Corp.* v. *N.L.R.B.*, 72 LRRM 2124 (C.A. 6, Sept. 3, 1969); *Republic Aluminum Co.* v. *N.L.R.B.*, 394 F. 2d 405 (C.A. 5); *United Steelworkers* v. *N.L.R.B.*, 393 F. 2d 661, 663 (C.A.D.C.); *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128 (C.A. 2), cert. denied, 376 U.S. 951; *Time-O-Matic, Inc.* v. *N.L.R.B.*, 264 F. 2d 96, 100-102 (C.A. 7).

[20] Enforcement denied on other grounds, 258 F. 2d 206, 213 (C.A. 4).

tional Act protects. And, in terms of protected presence on the store's exterior grounds, there is no distance at all between the employees' publication of their strike by handbill distribution and by picketing. Certain it is that the conduct is squarely within the statutory ambit of the National Labor Relations Act, and that places the determination of its incidents solely within the initial competence of the NLRB.[21]

"2. Commitment of the question to initial determination by the NLRB is equally clear when the injunction is related to the ban of picketing and handbill distribution on exterior store grounds by nonemployees. This is illustrated by the NLRB's court-approved rejection of a department store's claim that it could bar nonemployee organizers from soliciting union membership on a store-owned street open to the public. *Marshall Field & Co.*, 98 NLRB 88, 93, enforced as modified, 200 F. 2d 375 (C.A. 7). A large retail department store is bisected at ground level by a street owned by the store, known as Holden Court, used by the store employees and the public to enter the building (98 NLRB at 93; 200 F. 2d at 377): "It is open to the public for pedestrian use" (98 NLRB at 93). The Court of Appeals for the Seventh Circuit enforced the

[21] In *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, in sustaining the contested picketing as primary and protected, this Court treated as irrelevant the fact that "the picketed gate . . . was located on property owned by New York Central Railroad and not upon property owned by the primary employer" (*id.* at 499). The "striking employees could picket to induce a neutral railroad's employees to refuse to pick up and deliver cars for the struck employer—even though the picketed gate was owned by the railroad, and the railroad's employees would have to pass by the place of picketing to pick up and deliver cars for other plants that were not struck." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380.

NLRB's order requiring the store to permit nonemployee organizers to use Holden Court for union solicitation. The Seventh Circuit agreed that Holden Court "does partake of the nature of a city street, even though owned by the company" (200 F. 2d at 380), and its decree ordered the store to desist from "Prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time" (200 F. 2d at 382).

Commitment of the question to initial determination by the NLRB is further illustrated by relating the situation to the standard expressed by this Court in *N.L.R.B. v. Babcock & Wilcox*, 351 U.S. 105. An employer may refuse to permit distribution of union literature by nonemployee union organizers on a company-owned parking lot "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. Unlike the exterior grounds of a store, however, "the Babcock & Wilcox parking lot was not generally open to the public." *Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31*, 40 Cal. Rep. 233, 394 P. 2d 921, 926. The public character of the store's exterior grounds is crucial. To prohibit peaceful picketing or handbill distribution on otherwise open property is to hold that a "theoretical invasion" of property suffices of itself to suppress speech at the natural and effective place of its communication (*id.* at 924).

The *Babcock & Wilcox* standard supports no such result. As the NLRB has observed, as part of its

rationale to support its finding that a store owner committed an unfair labor practice "when it prohibited a union representative from entering its parking lot to solicit membership from its employees," the "parking lot was open to the public and employees." *Priced-Less Discount Foods*, 162 NLRB 872, n. 1. Similarly, upon a finding that an industrial park was open to the public, the NLRB held that an employer and the park owner "cannot deny access to the premises to union representatives, whether it be for picketing or handbilling." *Solo Cup Co.*, 172 NLRB No. 110, 68 LRRM 1385, 1386.[22]

Furthermore, banning peaceful picketing or handbill distribution on otherwise open property implicates precisely that discrimination which the *Babcock & Wilcox* standard forbids. To permit entry to the property of every element of the public except that part of the community with a labor message directed at and adverse to the store is invidious. The Circuit Court justifies this discriminatory debarment on the explicit ground that, "where a store owner invites prospective customers to come to his store to trade and to park on his grounds, made available therefor while doing business with the store owner, the invitation is for one particular purpose, not for *any* purpose to the general public . . . ." (A. 94). Conversely, therefore, it ex-

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[22] In a decision adopted by the NLRB in the absence of exceptions to it, an NLRB Trial Examiner aptly articulated the rationale: "Respondent's parking lot . . . was open to and used by the public as well as by its employees. In fact, it was intended primarily for public use as an adjunct to the store. Having made the parking lot available to the public, Respondent may not interfere with its employees' organizational activities by unreasonably denying access to it by union organizers." *Arlan's Dept. Store of Charleston*, Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965.

cludes other members of the public who by peaceful picketing or handbilling "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute." (*Thornhill* v. *Alabama*, 310 U.S. 88, 104). That differentiation makes the exercise of free speech the point of distinction in determining what part of the public to exclude from property otherwise generally open. The *Babcock & Wilcox* standard bars that discrimination.[23]

The specific enmeshment of the instant controversy in the work of the NLRB is particularly plain. The NLRB found that Weinacker's had engaged in massive unfair labor practices designed to thwart union organization culminating in its refusal to bargain in good faith with the Union when the employees nevertheless chose collective representation (*supra*, pp. 8-10). This finding of unfair labor practices is directly relevant to the question of entry on the exterior store grounds to picket or handbill. In determining whether or not to require an employer to permit access to its property by nonemployee union representatives, and in prescribing conditions for entry when required, the NLRB takes into account the employer's commission of unfair labor practices. Thus, in requiring that a store parking lot used by the public be opened to entry by a nonemployee union organizer, the NLRB observed that the employer "had engaged in widespread unfair labor practices. . . ." *Priced-*

[23] A privately-owned meeting hall in a company town was ordered opened to a union upon the same terms extended to others where even-handed access to the hall had been denied the union. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226.

Less Discount Foods, 162 NLRB 872, n. 1.[24] Similarly, in requiring that for six months nonemployee union organizers be given "access to [nonpublic] plant parking lots and plant approaches during nonworking time," the NLRB observed that the employer had "committed massive unfair labor practices which were, in substantial part, of a kind deliberately calculated to thwart the Union's attempts to communicate with employees through the usual channels." *Harlene Industries Corp.*, 166 NLRB No. 58, 65 LRRM 1626, 1632, enforced as modified, 406 F. 2d 886, 889 (C.A. 6). Whether or not the unfair labor practices committed by Weinacker's in this case are similarly relevant to the permissibility of picketing or handbilling in the immediate vicinity of its store only the NLRB can initially say. A state court has no power to determine the existence of unfair labor practices or their relevance to access to property as a remedy.

In short, whether viewed in relationship to exclusion of employees or nonemployees, debarment from the exterior grounds of the private but open property of the store offends the principle central to realization of the rights conferred by the NLRA. The promise of the statute is that the means and media of communication must be kept free and open. As stated

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[24] "Clearly the parking lot during off hours was a ready and effective place where employees could talk with the union organizer concerning organizational and union matters. It was a 'natural site' for the organizer to talk with selected employees . . . . The parking lot was the logical place for him to become acquainted with and to solicit new employees. Also the parking lot was a place where he could find any specific employee at the conclusion of his shift, because every employee had to use the parking lot in some way, either to go to a car and drive away, or to await the arrival of his pick-up. Indeed there was no place where the organizer could so easily make contact with the employees, old and new." 162 NLRB at 876.

in the Senate Report on Violations of Free Speech and Rights of Labor (S. Rep. No. 1150, 77th Cong., 2d Sess., Part 1, 4-5):

> The right of self-organization and collective bargaining is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life.

It is the function of the NLRB to keep the channels of communication open and unobstructed, and in the discharge of that function appropriate access to property in order to reach the audience cannot "be defeated through the simple assertion . . . of a landlord's interest." *Harlan Fuel Co.*, 8 NLRB 25, 32.

The NLRB is thus not ousted of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing or handbill distribution conducted on the exterior grounds of the private but open property of a store. It is the NLRB's business in the first instance to accommodate a claimed collision between recourse to protected activity and the use of private property. Peaceful picketing and handbilling on the exterior grounds of a store are no exception. A state court retains the authority to control the physical incidents of picketing or handbilling on those grounds but it has no power to bar either altogether because of private ownership.

Accordingly, apart from narrow state regulation of the physical incidents of picketing or handbilling, the

elements of the controversy place its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245. State jurisdiction is displaced so long as the dispute is within the class of conduct that the NLRB has been commissioned to deal with, regardless of whether or not the NLRB has taken the particular controversy in hand, as this Court has explained at length in *Garmon* (359 U.S. at 245-246):

> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. In that case we held that failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under

> the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

As the activity in this case is at the least "arguably protected," state intercession presents "the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered." *Hanna Mining Co.* v. *District 2; MEBA*, 382 U.S. 181, 193.[25] Since "the peaceful picketing complained of in this case is such conduct, Congress has ordained—to further uniform regulation and to avoid the inconsistencies which would result from the application of disparate state remedies—that only the federal agency shall deal with it." *Liner* v. *Jafco*, 375 U.S. 301, 306-307. Heedless of this principle, the state court in this case "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners." *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139.[26]

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[25] In other cases, the activity may be arguably prohibited as well, but preemption is of course still applicable.

[26] A number of state courts have concluded that picketing and handbilling on private but open property is within the preempted domain: *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 368 P. 2d 803; *Maryland* v. *Williams*, 44 LRRM 2357, 2362-64 (Md. Crim. Ct., June 10, 1959); *Weis Markets* v. *Retail Store Employees' Union, Local No. 692*, 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967).

III. The State Injunction Conflicts With Federally Protected Rights and Therefore Cannot Stand Even If the State Court Is Empowered To Adjudicate the Controversy.

While it would unhappily compel a return to "a now discarded approach to pre-emption" (*N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 493, n. 23),[27] a conclusion that the courts below are empowered to adjudicate the controversy requires this Court to decide whether the state courts rightly determined that the "activity enjoined in the instant case is . . . [not] protected by § 7 . . . of the National Labor Relations Act" (A. 119). For a State may not act in conflict with the command of Congress. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235. A "'State may not prohibit the exercise of rights which the federal Acts protect.'" *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75.

Peaceful picketing in support of a primary strike to secure improved employment terms is a preeminent expression of concerted activity for mutual aid or protection. "The Court has consistently held peaceful primary picketing incident to a lawful strike to be pro-

[27] In *Garmon*, speaking of *Automobile Workers* v. *Wisconsin Board* (*Briggs-Stratton*), 336 U.S. 245, this Court stated that the "approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application" (359 U.S. at 245, n. 4). As thereafter elaborated, "of special significance is the fact that the approach to pre-emption taken in *Briggs-Stratton* was that the state courts and this Court on review were required to decide whether the activities were either protected by § 7 or prohibited by § 8. This approach is 'no longer of general application,' . . . as this Court has since developed the doctrine in pre-emption cases that questions of interpretation of the National Labor Relations Act are generally committed in the first instance to the Board's administrative processes. . . ." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 493, n. 23.

tected conduct under the Labor Management Relations Act . . . . [P]rotected primary picketing 'has characteristically been aimed at all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavoring to halt,' . . . including other employers and their employees." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385, 388.

Primary picketing is enfeebled by removing it from the store entrance to the distant parking lot entrances. The removal screens the offending employer from picketing by interposing a parking lot between the workers and the situs of the dispute. The interposition of this buffer seriously weakens the workers' ability to enlist public support to refrain from patronizing or serving the struck store, to dissuade employees from taking jobs at the struck store as strike replacements, and to maintain the strikers' own solidarity and morale. This divorcement of the picketing from the immediate vicinity of the store is especially detrimental in this case because it further dislocates the balance of economic power between the workers and the employer which the massive unfair labor practices committed by Weinacker's had already badly disjointed (*supra*, pp. 8-10).

And assuming, but not granting (*supra*, p. 29, n. 11), that obstructive picketing took place, this factor would authorize no more than an injunction narrowly drawn to reach only the physically obstructive aspects of the picketing (*Youngdahl* v. *Rainfair*, 355 U.S. 131, 137-140; *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-732), leaving its continuance at the situs of the dispute otherwise unmolested. Nor can the employer's bare property interest of itself justify banishment from the

exterior store grounds when the realization of a federal right weighs in the balance (*supra*, pp. 37-45).

Accordingly, absolute exclusion of all picketing from the immediate vicinity of the store results in state prohibition of "the exercise of rights explicitly protected by § 7" of the National Labor Relations Act, and such state denial of federal rights "cannot stand under the Supremacy Clause of the Constitution." *Division 1287, Amalgamated Association* v. *Missouri*, 374 U.S. 74, 82. In an area where federal law operates and is paramount, "the inconsistent application of state law is necessarily outside the power of the State." *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 296.

CONCLUSION

For the reasons stated the judgment should be reversed.

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APPENDIX

APPENDIX A

Relevant Provisions of the National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, Et Seq.)

SEC. 2. When used in this Act—

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantialy equivalent employment. . . .

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b).

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.